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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

MARJORIE MARTINEZ,

Plaintiff and Appellant,

v.

GREYSTONE HOMES, INC.,

Defendant and Respondent.

B157351

(Los Angeles County
Super. Ct. No. KC035521)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Conrad Richard Aragon, Judge. Affirmed.

Tristan R. Pico and Nolan E. Clark for Plaintiff and Appellant.

Barry A. Ross for Defendant and Respondent.

Plaintiff Majorie Martinez (Martinez) appeals from a summary judgment entered in favor of defendant Greystone Homes, Inc. (Greystone) on a complaint seeking recovery for slip and fall injuries. According to Martinez, summary judgment must be

reversed because: (1) *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198 (*Hooker*) establishes that an employee of a contractor can sue a person who hires the contractor if that person's negligence in maintaining the job site results in the employee suffering injuries; (2) there is a triable issue as to whether Greystone's negligence caused Martinez's injuries; and (3) the trial court abused its discretion when it denied Martinez a continuance to conduct discovery. We conclude that Martinez failed to demonstrate a triable issue sufficient to defeat summary judgment and the trial court did not abuse its discretion in denying a continuance.

We affirm.

FACTS

Greystone, a developer, entered into a contract with Real Estate Temps to provide real estate sales professionals. While working for Real Estate Temps, Martinez showed Greystone's partially completed homes to prospective buyers. On one of her trips to a construction site, Martinez tripped and fell.

Martinez sued Greystone for negligence and premises liability. Greystone moved for summary judgment, arguing that it is not vicariously liable for Martinez's injuries, and that it did not cause her injuries. Martinez requested a continuance to depose two witnesses who might be able to identify the object that caused her to trip. The trial court denied Martinez's request for a continuance and granted summary judgment.

In its order, the trial court stated: "There are no triable issues of material fact because there is no showing that Greystone contributed to, maintained control over or was a substantial factor in causing the unidentified hazard which caused plaintiff's injury, nor that Greystone directed or controlled the manner in which plaintiff's employer conducted its work at the site. Greystone is exempt from liability here both under *Privette* [*v. Superior Court* (1993) 5 Cal.4th 689 (*Privette*)] and its progeny and because plaintiff can not [*sic*] establish the requisite legal causation. A continuance is not warranted here. Plaintiff fails to demonstrate how this additional testimony would lead to material issues of disputed facts which could defeat this motion, nor does she explain the delay in noticing these depositions."

Judgment was entered and this timely appeal followed.

DISCUSSION

I. Summary judgment.

Upon review of the record, we conclude that Martinez failed to show a triable issue as to causation.

a. *Standard of review.*

“A trial court properly grants summary judgment where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) We review the trial court’s decision de novo, considering all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports. [Citation.]” (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.) We must uphold the trial court’s decision if it is correct on any ground, regardless of the reasons the trial court gave. (*Biljac Associates v. First Interstate Bank* (1990) 218 Cal.App.3d 1410, 1419.) “[W]e construe the moving party’s affidavits strictly, construe the opponent’s affidavits liberally, and resolve doubts about the propriety of granting the motion in favor of the party opposing it.” (*Szadolci v. Hollywood Park Operating Co.* (1993) 14 Cal.App.4th 16, 19.)

b. *Causation.*

It was undisputed that Martinez stated in her deposition that she does not know what caused her to trip and fall. Nonetheless, Martinez contends that there is a triable issue as to causation because a jury could conclude that (1) Greystone negligently allowed debris to accumulate at its construction site and (2) she tripped and fell on an item of debris. We disagree.

“[A] moving defendant need not support his motion with affirmative evidence negating an essential element of the responding party’s case. Instead, the moving defendant may (through factually vague discovery responses or otherwise) point to *the absence of evidence to support the plaintiff’s case*. When that is done, the burden shifts to the plaintiff to present evidence showing there is a triable issue of material fact. If the

plaintiff is unable to meet her burden of proof regarding an essential element of her case, all other facts are rendered immaterial. [Citations.]” (*Leslie G. v. Perry & Associates* (1999) 43 Cal.App.4th 472, 482 (*Leslie G.*).

By citing Martinez’s inability to identify the object that caused her to trip and fall, Greystone shifted the burden to Martinez to produce evidence demonstrating the existence of a triable issue. In her opposition, Martinez referred to testimony in her deposition establishing that almost every day there was construction debris (such as boards, rocks, paper) on the street in front of Greystone’s homes. This was insufficient to meet her burden.

An appellate court “will not . . . draw inferences from thin air. Where, as here, the plaintiff seeks to prove an essential element of her case by circumstantial evidence, she cannot recover merely by showing that the inferences she draws from those circumstances are *consistent* with her theory. Instead, she must show that the inferences favorable to her are *more reasonable or probable* than those against her. [Citations.]” (*Leslie G., supra*, 43 Cal.App.4th at p. 483.) “““A legal inference cannot flow from the nonexistence of a fact; it can be drawn only from a fact actually established. [Citation.] It is axiomatic that ‘an inference may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work.’ [Citation.]”” (*Brautigam v. Brooks* (1964) 227 Cal.App.2d 547, 556.)

Any inference that Martinez tripped on construction debris can only be based on conjecture as to the nonexistence of some other cause for her fall, and guesswork as to whether construction debris was present on the day of the incident and whether Martinez’s foot struck that debris. Our assessment of Martinez’s evidence is bolstered by *Leslie G.* In that case, the appellant was raped in the garage of an apartment building. She sued the owners of the apartment building, contending that they negligently failed to fix a broken security gate. (*Leslie G., supra*, 43 Cal.App.4th at p. 476.) In upholding summary judgment for the owners, the court stated: “Since there is no direct evidence that the rapist entered or departed through the broken gate (or even that the broken gate was the only way he could have entered or departed), Leslie cannot survive summary

judgment simply because it is *possible* that he *might* have entered through the broken gate. [Citations.]” (*Id.* at p. 483.) Here, as in *Leslie G.*, a mere possibility cannot defeat a summary judgment motion.

All other summary judgment issues are moot.

II. Martinez’s request for a continuance.

Code of Civil Procedure section 437c, subdivision (h) provides in relevant part that “[i]f it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication or both that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented, the court shall deny the motion, or order a continuance to permit affidavits to be obtained or discovery to be had or may make any other order as may be just.”

“The nonmoving party seeking a continuance ‘Must Show: (1) the facts to be obtained are essential to opposing the motion; (2) there is reason to believe such facts may exist; and (3) the reasons why additional time is needed to obtain these facts. [Citations.]’ [Citation.] The decision whether to grant such a continuance is within the discretion of the trial court. [Citation.]” (*Frazee v. Seeley* (2002) 95 Cal.App.4th 627, 633.)

Below, Martinez’s attorney declared that on September 28, 2001, Greystone’s counsel provided the names of the prospective buyer and buyer’s agent who were with Martinez when she fell.¹ Her attorney then declared that “they may be able to identify the exact item on which [Martinez] tripped” and that he planned to interview or depose them within 60 days.~ However, he failed to explain why he did not depose or interview these witnesses after receiving Greystone’s responses to form interrogatories, being notified a second time of their names in September 2001, and receiving Greystone’s motion for summary judgment.

¹ Martinez received notice of the identity of these two witnesses in Greystone’s responses to form interrogatories, which were served on June 19, 2001. Martinez’s counsel failed to acknowledge this fact.

Under these circumstances -- where the party seeking a continuance has been entirely derelict in her duty to explain her delay -- we cannot conclude that the trial court abused its discretion.

DISPOSITION

Summary judgment is affirmed.

Greystone shall recover its costs on appeal.

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_____, J.
ASHMANN-GERST

We concur:

_____, Acting P. J.
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_____, J.
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